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Statutes of Limitations in Tort: Who Do They Limit?

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COMMENTS

STATUTES OF LIMITATIONS IN TORT: WHO DO THEY LIMIT?

I. INTRODUCTION

Statutes of limitation once played a more useful role in Wisconsin's legal system than they do today. The purposes behind statutes of limitation are "(1) [t]hat of discouraging stale and fraudulent claims, and (2) that of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained."[1] Any person seeking relief for injury was to have brought his claim within the time period stated in the statute or be barred.[2] However, the passage of new legislation[3] and the development of recent case law[4] has dramatically altered these defense-oriented statutes by construing them to allow recovery for nearly every plaintiff.[5]

The issue of greatest concern regarding the decline in the effectiveness of the statutes of limitation in tort is the application and expansion of the

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1. Peterson v. Roloff, 57 Wis. 2d 1, 6, 203 N.W.2d 699, 702 (1973) (footnote omitted). *See also* Borello v. U.S. Oil Co., 130 Wis. 2d 397, 388 N.W.2d 140 (1986); Hansen v. A.H. Robins, Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983); Rod v. Farrell, 96 Wis. 2d 349, 291 N.W.2d 568 (1980). For a brief discussion of competing policy concerns, see Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983) [hereinafter Note, *The Fairness and Constitutionality*]; Ghiardi, *Computing Time in Tort Statutes of Limitation*, 64 MARQ. L. REV. 575 (1980-81); Reeves & Hirsh, *For Whom the Bell Tolls*, 32 MED. TRIAL TECH. Q. 414 (1986); Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663 (1978); Note, *Limitation Tolling When Class Status Is Denied*: Chardon v. Fumero Soto *and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686 (1985); Note, *Reaffirming the Discovery Rule in Medical Malpractice Actions*: Neagle v. Nelson, 28 S. TEX. L. REV. 139 (1987).

2. *See* WIS. STAT. § 330.205 (1961).

3. *See infra* notes 20-21 and accompanying text.

4. Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980); Jaeger v. Raymark Indus., 610 F. Supp. 784 (E.D. Wis. 1985); Reimer v. Owens-Corning Fiberglas Corp., 576 F. Supp. 197 (E.D. Wis. 1983); Neubauer v. Owens-Corning Fiberglass Corp., 504 F. Supp. 1210 (E.D. Wis. 1981); *Borello*, 130 Wis. 2d 397, 388 N.W.2d 140; *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578.

5. Recently, Wisconsin Circuit Court Judge Ralph Adam Fine stated: "to wait for actual maturation of the disease before starting the Statute of Limitations clock, would . . . eliminate the possibility of *any* Statute of Limitations defense irrespective of when the action was brought." Meracle v. Children's Serv. Soc'y, Case No. 680-805 (1987) (emphasis in original).

recently enacted "discovery rule."[6] Two of the main forces behind the expansion have been the influx in the number of insidious diseases[7] and the contemplation of a number of yet undiscovered latent diseases.[8]

As a result of recent decisions applying the discovery rule, the Wisconsin courts have made no attempt to save any limiting effects of the statutes, thus defeating their effectiveness as "statutes of limitation." One of the most recent applications of the statutes in Wisconsin has prompted a need for new legislation in order to recapture the spirit of the statute and apply it justiciously to tort law.[9]

This Comment will trace the development of the Wisconsin statutes of limitation in tort, review the corresponding changes in Wisconsin case law and analyze the present and future problems associated with the discovery rule within the statutes.[10] In addition, this Comment will propose alternative solutions to the problems introduced in an effort to eliminate the confusion and inconsistencies that plague the Wisconsin courts today.

II. BACKGROUND

A review of the present state of Wisconsin's statutes of limitation would be superficial without analyzing the statutory and case law development in the past few decades. It is through this development that one recognizes how far our courts have strayed from the original purpose of the statute.

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6. Beginning in the medical malpractice area, a growing number of judicial decisions and legislative enactments exercised the use of the discovery rule, whereby the statute of limitation was tolled until the injured party discovered, or by reasonable diligence should have discovered his injury. *See* Layton v. Allen, 246 A.2d 794 (Del. 1968); Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605 (1971); Billings v. Sisters of Mercy, 86 Idaho 485, 389 P.2d 224 (1964); Mathis v. Hejna, 109 Ill. App. 2d 356, 248 N.E.2d 767 (1969); Franklin v. Albert, 381 Mass. 611, 411 N.E.2d 458 (1980); Moran v. Napolitano, 71 N.J. 133, 363 A.2d 346 (1976); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Newberry v. Tarvin, 594 S.W.2d 204 (Tex. Ct. App. 1980); Foil v. Ballinger, 601 P.2d 144 (Utah 1979).

The application of the discovery rule spread from doctors to dentists, accountants, architects, lawyers and manufacturers of products proven to be defective. For a list of cases illustrating these expansions, see W. PROSSER & W. KEETON, THE LAW OF TORTS § 30, at 167 nn.19-23 (5th ed. 1984).

7. An insidious disease is one which progresses with very few or no symptoms to indicate its seriousness. STEDMAN'S MEDICAL DICTIONARY 776 (20th ed. 1961).

8. "[L]atent disease suits may shake the foundations of U.S. tort law, threaten the financial health of insurance companies and some industries, and contribute to the nation's economic problems." Podgers, *Toxic Time Bombs*, 67 A.B.A. J. 139, 139 (1981).

9. *See Reimer*, 576 F. Supp. 197; *Borello*, 130 Wis. 2d 397, 388 N.W.2d 140; *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578.

10. *See supra* note 6.

A. Statutory Development

Statutes of limitation were originally developed to protect defendants in cases where the plaintiff was sitting on his claim until important evidence was lost and witnesses disappeared.[11] Thus, the statutes attempted to address equal policy concerns by ensuring prompt litigation of meritorious claims and providing defendants with a tool to avoid stale and fraudulent claims.[12]

In 1963, "[a]n action to recover damages for injuries to the person for such injuries sustained" was to be commenced within three years after the cause of action accrued or be barred.[13] This statute applied to both personal injury and wrongful death actions.[14] At this time[15] there were no separate statutes designed to apply to medical malpractice actions.[16] There was, however, an extended six-year limitation period governing actions for relief for fraud,[17] but this statute was held not to apply to negligence or malpractice actions.[18] The three-year statute remained virtually unchanged[19] until 1980, when a new limitation of actions applicable to medical malpractice suits became effective.[20] This statute provides:

> (1) Except as provided by subs. (2) and (3), an action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based, shall be commenced within the later of:
> (a) Three years from the date of the injury, or
> (b) One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered, except that

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11. For a brief discussion of the basic philosophy behind all statutes of limitation, see Reeves & Hirsh, *supra* note 1, at 415.

12. Armes v. Kenosha County, 81 Wis. 2d 309, 260 N.W.2d 515 (1977).

13. WIS. STAT. § 330.205 (1963); *see also* Haase v. Sawicki, 20 Wis. 2d 308, 121 N.W.2d 876 (1963).

14. WIS. STAT. § 330.205(2) (1963).

15. Section 330.205 of the Wisconsin Statutes remained exactly the same, but was renumbered as 893.205 from 1957 through 1980.

16. There were, however, other statutes of limitation addressing such actions as libel, slander, unpaid salary, and seduction.

17. WIS. STAT. § 330.19(7) (1963) provides: "Within 6 years: . . . (7) An action for relief on the ground of fraud. The cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud."

18. McCluskey v. Thranow, 31 Wis. 2d 245, 251, 142 N.W.2d 787, 790 (1966).

19. *See supra* note 15.

20. Section 893.55 of the Wisconsin Statutes was created under the laws of 1979, but subsequently became effective July 1, 1980. Rod v. Farrell, 96 Wis. 2d 349, 354 n.7, 291 N.W.2d 568, 571 n.7 (1980).

> an action may not be commenced under this paragraph more than 5 years from the date of the act or omission.
> (2) If a health care provider conceals from a patient a prior act or omission of the provider which has resulted in injury to the patient, an action shall be commenced within one year from the date that the patient discovers the concealment or, in the exercise of reasonable diligence, should have discovered the concealment or within the time limitation provided by sub. (1), whichever is later.
> (3) When a foreign object which has no therapeutic or diagnostic purpose or effect has been left in a patient's body, an action shall be commenced within one year after the patient is aware or, in the exercise of reasonable care, should have been aware of the presence of the object or within the time limitation provided by sub. (1), whichever is later.[21]

This section was designed to set forth precise time limits within which an action to recover damages from medical malpractice must be commenced.[22] The first subsection addresses general time limits, requiring the patient to commence action either within the general three-year period or within one year from the date of discovery, whichever is later. It also provides an outer limit of five years from the time of the act or omission.[23] The second and third subsections, which are designed as exceptions to subsection one, allow for different time periods when confronted with fraudulent concealment by a health care provider[24] or a foreign object left in a patient's body.[25]

B. Changes in Wisconsin Case Law

The impact that the statutes have had upon various plaintiffs is best illustrated by a review of Wisconsin case law.[26] Although the pre-1980 stat-

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21. WIS. STAT. § 893.55 (1983-84).
22. *See id.* at § 893.55 (1983-84) (Judicial Council Committee's Note).
23. *Id.* at § 893.55(1).
24. *Id.* at § 893.55(2).
25. *Id.* at 893.55(3). The most logical explanation for this universally adopted foreign object exception is that there is little or no chance of fraudulent claims. Myrick v. James, 444 A.2d 987 (Me. 1982). There is, however, a wide divergence among courts as to what objects are considered foreign. *Compare* Raymond v. Eli Lilly & Co., 412 F. Supp. 1392 (D.N.H. 1976) (pill-like foreign object) *with* Fonda v. Paulsen, 79 Misc. 2d 936, 361 N.Y.S.2d 481 (1974) (cancer not a foreign object) *and* Le Vine v. Isoserve, Inc., 70 Misc. 2d 747, 334 N.Y.S.2d 796 (1972) (radioactive isotope is a foreign object).

The basis of section 893.205 of the Wisconsin Statutes was not eliminated upon the enactment of section 893.55, but was renumbered section 983.54 and amended to eliminate language now covered by Section 893.07 (covering the application of foreign statutes of limitation).

26. For a summary of Wisconsin case law, see Borello v. U.S. Oil Co., 130 Wis. 2d 397, 388 N.W.2d 140 (1986) and Hansen v. A.H. Robins, Inc., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

utes were increasingly criticized by the time they were modified,[27] they were consistently applied.[28] On the other hand, the 1980 statutory reform created a host of questions that have been, and continue to be, contemplated by the courts.[29]

1. Pre-Discovery

The Wisconsin legislature has provided that statutes of limitation begin to run at the time when the cause of action accrues.[30] Furthermore, there has been general agreement among the courts that a cause of action accrues "where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it."[31] But as to the different causes of action available, the more difficult question becomes when did the plaintiff's first opportunity to act upon the claim occur? A cause of action in tort could accrue at three different points in time: (1) the time of the negligent act or omission, (2) the time of injury, or (3) the time of discovery of the injury.[32] In determining at what point the cause of action would accrue, the court examines the elements of the cause of action. A claim capable of enforcement requires that all of the necessary elements of a cause of action exist.[33] Since damages are

27. *See* Rod v. Farrell, 96 Wis. 2d 349, 291 N.W.2d 568 (1980) (denial of recovery in a medical malpractice action for severance of plaintiff's vasa during a hernia operation); Peterson v. Roloff, 57 Wis. 2d 1, 203 N.W.2d 699 (1973) (denial of recovery in a medical malpractice action against the representatives of a deceased physician who, during a gall bladder operation, allegedly failed to remove the cystic duct and also left a piece of gauze within plaintiff's abdomen); Holifield v. Setco Indus., 42 Wis. 2d 750, 168 N.W.2d 177 (1969) (denial of recovery in a products action after decedent was fatally injured by flying parts of a grinding machine which had been purchased 10 years prior to the injury).

28. *See, e.g., Rod*, 96 Wis. 2d 349, 291 N.W.2d 568; Pulchinski v. Strnad, 88 Wis. 2d 423, 276 N.W.2d 781 (1979); *Peterson*, 57 Wis. 2d 1, 203 N.W.2d 699; Olson v. St. Croix Valley Memorial Hosp., 55 Wis. 2d 628, 201 N.W.2d 63 (1972); *Holifield*, 42 Wis. 2d 750, 168 N.W.2d 177; *McCluskey*, 31 Wis. 2d 245, 142 N.W.2d 787; *Haase*, 20 Wis. 2d 308, 121 N.W.2d 876; Barry v. Minahan, 127 Wis. 570, 107 N.W. 488 (1906).

29. *See Peterson*, 57 Wis. 2d at 9-17, 203 N.W.2d at 703-07 (what is an injury?); Ghiardi, *supra* note 1, at 576-86 (when does a cause of action accrue?); Reeves & Hirsh, *supra* note 1, at 416-27 (what is discovery?).

30. WIS. STAT. § 893.04 (1979-80).

31. *Barry*, 127 Wis. at 573, 107 N.W. at 490 (citations omitted). *Accord Borello*, 130 Wis. 2d at 419, 388 N.W.2d at 149; *Hansen*, 113 Wis. 2d at 554, 335 N.W.2d at 580; *Rod*, 96 Wis. 2d at 352, 291 N.W.2d at 569-70; Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis. 2d 314, 323, 291 N.W.2d 825, 830 (1980) (citations omitted); *Holifield*, 42 Wis. 2d at 754, 168 N.W.2d at 179.

32. *Holifield*, 42 Wis. 2d at 759, 168 N.W.2d at 182; *see also* Ghiardi, *supra* note 1, at 576-77.

33. For a discussion of the necessary elements for a negligence claim, see *Holifield*, 42 Wis. 2d 750, 168 N.W.2d 177.

> It is the fact and date of injury that sets in force and operation the factors that create and establish the basis for a claim of damages. It is true that, without an act of negligence,

an essential element of a tort,[34] Wisconsin courts adopted the time of injury as the point of accrual.

Prior to 1980, the Wisconsin courts refused to depart from the time of injury point of accrual in personal injury cases. In *McCluskey v. Thranow*,[35] the Wisconsin Supreme Court was asked to adopt the discovery rule for a man who suffered from the presence of an eight-inch hemostat in his abdomen as a result of a negligently performed splenectomy. The court concluded that "this question is not open to new adjudication in Wisconsin,"[36] since the legislature previously had the opportunity to create a statutory discovery rule but consciously refused to do so.

Although the Wisconsin Supreme Court adhered strictly to the statutes of limitation, dissenting voices suggested alternatives.[37] Justice Hallows, dissenting in *Peterson v. Roloff*,[38] recognized the questions left unanswered by the statutes of limitation in tort:

> In every tort action there must be at least three elements — the negligent act or breach of duty, the causation, and an injury which is recognizable in money damages. Until the injury occurs, no harm is done and there is nothing to be compensated for; therefore, there is no cause of action for damages. . . .
>
> Since injury is necessary to establish a cause of action, the question becomes, what is an injury and when does an injury in a malpractice case occur?[39]

The question concerning injury becomes increasingly important when analyzing cases where the negligent act or omission is not simultaneous with a

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no claim for damages based on negligence can arise. It is likewise true that, without the result of injury, no claim for damages based on negligence can be asserted, or at least successfully asserted. Both the act of negligence and the fact of resultant injury must take place before [a] cause of action founded on negligence can be said to have accrued.

Id. at 756, 168 N.W.2d at 180.

34. *See Rod*, 96 Wis. 2d 349, 291 N.W.2d 568; *Holifield*, 42 Wis. 2d 750, 168 N.W.2d 177.

35. 31 Wis. 2d 245, 142 N.W.2d 787 (1966).

36. *Id.* at 250-51, 142 N.W.2d at 790 (footnote omitted). Likewise, the court exercised judicial restraint and refused to consider adopting the discovery rule in Olson v. St. Croix Valley Memorial Hosp., 55 Wis. 2d 628, 201 N.W.2d 63 (1972) (where plaintiff was given a blood transfusion of the wrong type, the court held that the cause of action accrued at the time of the transfusion and not seven years later when her child was born dead) and Reistad v. Manz, 11 Wis. 2d 155, 105 N.W.2d 324 (1960) (court refused to adopt the discovery rule for plaintiff's medical malpractice action, brought 20 years after doctors left guaze in his abdomen). For a review of jurisdictions that did apply the discovery rule at that time, see Note, *Statute of Limitations — Professional Negligence — Foreign Objects Left in Patient's Body*, 17 VAND. L. REV. 1577 (1964).

37. *See Rod*, 96 Wis. 2d at 360-61, 291 N.W.2d at 573-74 (Abrahamson, J., dissenting); *Peterson*, 57 Wis. 2d at 7-17, 203 N.W.2d at 702-07 (Hallows, C.J., dissenting).

38. 57 Wis. 2d 1, 7-17, 203 N.W.2d 699, 702-07 (1973).

39. *Id.* at 8-9, 203 N.W.2d at 703 (Hallows, C.J., dissenting).

cognizable injury; namely medical malpractice and products liability cases.[40] It was not until the courts became flooded with such cases that the problems involved became evident and a search for solutions began.

The problems raised an interesting argument regarding the statutes of limitation in tort. In *Rod v. Farrell*,[41] the plaintiff suggested that the statute applied at the time[42] violated his constitutional rights "to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character."[43] Although the Wisconsin Supreme Court held this constitutional challenge to be invalid,[44] a number of other jurisdictions attacked their rigid statutes of limitation on a constitutional basis.[45]

Courts have also attacked rigid statutes of limitation on the basis of public policy. An innocent victim's recovery should not be barred when the victim does not know, or have reason to believe, he has been injured in any way. Likewise, a negligent actor should not be preferred over an innocent victim.[46] These challenges prompted the introduction of a surge of session bills in the legislature[47] and a search for alternatives to avoid the harshness of the statutes.[48]

2. Development of the Discovery Rule

The rigid application of the statutes often resulted in illogical decisions. The illogic and injustice caused by the rigid application of the statutes of limitation in medical malpractice and product liability cases led one judge to write:

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running

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40. *Compare Rod*, 96 Wis. 2d 349, 291 N.W.2d 568 (medical malpractice "delayed injury"); *Peterson*, 57 Wis. 2d 1, 203 N.W.2d 699 (medical malpractice "foreign object") *with* Reimer v. Owens-Corning Fiberglass Corp., 576 F. Supp. 197 (E.D. Wis. 1983) (products liability "asbestos"); *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578 (products liability "IUD").

41. 96 Wis. 2d 349, 291 N.W.2d 568 (1980).

42. WIS. STAT. § 893.205 (1971). It is interesting to note that just two months after this case was decided, Section 893.55 became effective.

43. WIS. CONST. art. I, § 9.

44. *Rod*, 96 Wis. 2d at 356, 291 N.W.2d at 571. Although the court held that "a statute of limitations might offend Art. I, sec. 9, Wisconsin Constitution, if it extinguished a claim of a potential plaintiff before that plaintiff suffered an injury," the plaintiff in this case was found to have been injured on the day the negligence occurred. *Id.*

45. *See* Note, *For Want of a Nail: The Discovery Rule in Medical Malpractice Cases*, 27 ARIZ. L. REV. 265, 265-67 (1985) [hereinafter *For Want of a Nail*]; Note, *The Fairness and Constitutionality*, *supra* note 1, at 1692-702.

46. *Peterson*, 57 Wis. 2d at 12, 203 N.W.2d at 705 (Hallows, C.J., dissenting).

47. *Rod*, 96 Wis. 2d at 354 n.6, 291 N.W.2d at 570 n.6.

48. *See infra* text accompanying notes 50-53.

> on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to the plaintiff.[49]

As a result of legislative inaction, many courts have attempted to modify the effect of the statutes through alternative solutions such as: applying contract law which applies a longer statute of limitation than tort law;[50] applying the continuous treatment doctrine where the statute of limitation does not commence until doctor-patient relationship terminates;[51] applying the fraudulent concealment theory which tolls the statute until discovery when a physician has concealed his malpractice;[52] and adopting the discovery rule in cases where the plaintiff is unable to recognize his injury.[53] Recent decisions by the Wisconsin courts, however, have rendered the statutes of limitation virtually ineffective.

By 1973, over one-half of the states had adopted some form of a discovery rule,[54] either by statute[55] or by judicial interpretation.[56] Wisconsin

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49. Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting) (footnotes omitted).

50. *See* Baum v. Turel, 206 F. Supp. 490 (S.D.N.Y. 1962); Giambozi v. Peters, 127 Conn. 380, 16 A.2d 833 (1940); Suskey v. Davidoff, 2 Wis. 2d 503, 87 N.W.2d 306 (1958); Klingbeil v. Saucerman, 165 Wis. 60, 160 N.W. 1051 (1917).

51. *See* Grondahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982); Thatcher v. De Tar, 351 Mo. 603, 173 S.W.2d 760 (1943); McDermott v. Torre, 56 N.Y.2d 399, 437 N.E.2d 1108, 452 N.Y.S.2d 351 (1982); Lomber v. Farrow, 91 A.D.2d 725, 457 N.Y.S.2d 638 (1982); Samuelson v. Freeman, 75 Wash. 2d 894, 454 P.2d 406 (1969). See generally Reeves & Hirsh, *supra* note 1, at 423-24 for an overview of the continuous treatment rule.

52. *See* Allen v. Layton, 235 A.2d 261 (Del. Super. Ct. 1967); Eschenbacher v. Hier, 363 Mich. 676, 110 N.W.2d 731 (1961); Rothman v. Silber, 90 N.J. Super. 22, 216 A.2d 18 (1966); Krestich v. Stefanez, 243 Wis. 1, 9 N.W.2d 130 (1943). *Contra* Tulloch v. Haselo, 218 A.D. 313, 218 N.Y.S. 139 (1926). The Supreme Court of New York subsequently held that failure to disclose a negligent act constituted malpractice in Kleinman v. Lack, 6 A.D.2d 1046, 179 N.Y.S.2d 194 (1958).

53. *See* Puro v. Henry, 188 Conn. 301, 449 A.2d 176 (1982); Childers v. Tauber, 148 Ga. App. 157, 250 S.E.2d 787 (1978); Stoner v. Carr, 97 Idaho 641, 550 P.2d 259 (1976); Cutsinger v. Cullinan, 72 Ill. App. 3d 527, 391 N.E.2d 177 (1979); Hepp v. Pierce, 460 N.E.2d 186 (Ind. Ct. App. 1984); *Myrick*, 444 A.2d 987 (Me. 1982); Ross v. Kansas City Gen. Hosp. & Medical Center, 608 S.W.2d 397 (Mo. 1980); Fox v. Passaic Gen. Hosp., 135 N.J. Super. 108, 342 A.2d 859 (1975); Ooft v. City of New York, 104 Misc. 2d 879, 429 N.Y.S.2d 376 (1980); Adams v. Sherk, 4 Ohio St. 3d 37, 446 N.E.2d 165 (1983); Keating v. Zemel, 281 Pa. Super. 129, 421 A.2d 1181 (1980).

54. *See* Comment, *Medical Malpractice-Statute of Limitations Tolled Until Patient Can Reasonably Discover Foreign Object Negligently Left in His Body During Surgery*, 8 GA. ST. B.J. 244, 250 n.30 (1971-72).

55. *See* ALA. CODE § 25(1) (Supp. 1955); CONN. GEN. STAT. § 52-584 (1958); ILL. REV. STAT. ch. 83, sec. 22.1 (1965); OR. REV. STAT. § 12.110(4) (1967).

courts continued to reject the discovery rule, not in distaste for the rule, but rather because the courts maintained that amendment must originate within the legislature. Nevertheless, the legislature remained inactive until the courts made it clear that if the legislature was not going to act, the courts would:

> "We closed our courtroom doors without legislative help, and we can likewise open them." Our courts should be alive to the demands of justice. Here, the legislature has not defined accrual of a cause of action and this case calls for the exercise of our judicial duty to interpret the statutory language "after the cause of action has accrued" so as to offer reasonable protection to the innocent victim of medical malpractice.[57]

Shortly thereafter, in 1980, the Wisconsin legislature opened its own doors and enacted the new medical malpractice statute, which included the discovery rule.[58] Although the legislature considered and rejected a discovery rule which would apply to all types of personal injury actions,[59] a short time later the Wisconsin Supreme Court, in *Hansen v. A.H. Robins Co.*,[60] expanded the application of the discovery rule to all tort actions.[61] In *Hansen*, Justice Callow reasoned that there are other tort actions, which closely resemble medical malpractice, whereby the plaintiff is unaware of his injury at the time of the negligent act or omission. These cases should not be ignored simply because the negligent actor was a manufacturer of a product rather than a health care provider.[62] The full impact of this expansion is

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56. *See* Owens v. Brochner, 172 Colo. 525, 474 P.2d 603 (1970); Renner v. Edwards, 93 Idaho 836, 475 P.2d 530 (1970); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968); Janisch v. Mullins, 1 Wash. App. 393, 461 P.2d 895 (1969); Morgan v. Grace Hosp., Inc., 149 W. Va. 783, 144 S.E.2d 156 (1965).

57. Peterson v. Roloff, 57 Wis. 2d 1, 16-17, 203 N.W.2d 699, 707 (1973) (Hallows, C.J., dissenting) (quoting in part Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 178, 260 P.2d 765, 774 (1953)).

58. *See supra* text accompanying note 21.

59. The 1979 Assembly Bill 327 would have provided in part: "an action to recover injuries to the person shall be commenced within three years after the person injured discovers the injury or reasonably should have discovered the injury, whichever first occurs, or be barred."

60. 113 Wis. 2d 550, 335 N.W.2d 578 (1983). See *infra* text accompanying notes 136-42 for a summary of *Hansen*.

61. *Id.* "The notion that a tort claim (other than medical malpractice) accrues when the injury is discovered or is reasonably discoverable is not completely foreign to Wisconsin law. We recently took a step in this direction in *Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction*." *Id.* at 557-58, 388 N.W.2d at 581 (citation omitted).

62. *See* Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URB. L.J. 55, 81-83 (1978-79); *see generally Hansen*, 113 Wis. 2d at 554-61, 335 N.W.2d at 580-83.

unknown, but the case of *Borello v. U.S. Oil Co.*[63] indicates areas of conflict in the very near future.

In *Borello*, the plaintiff suffered from metal fume fever due to a defective furnace.[64] Within the same month that the furnace was installed, Ms. Borello wrote to the company that installed the furnace stating: "'[m]y nose burns, makes me dizzy, headaches are bad and now my chest even hurts. It seems there is a lack of oxygen and I keep opening the windows.'"[65] One could argue that Ms. Borello discovered her injury at the time of the letter, thus putting the statute of limitation in motion and eventually barring her claim. Nonetheless, the Wisconsin Supreme Court held that Ms. Borello's discovery of the injury itself was not sufficient to toll the statute.[66] The court further expanded the discovery rule[67] requiring not only the discovery of the injury, but also the "cause" of the injury.[68] The reasons given by the court were two-fold: first, because of "a legislatively approved pattern of the discovery rule" in worker's compensation cases[69] and second, because of the injustice involved in barring a claimant's action before he is aware of such right to action.[70]

In the wake of *Hansen* and *Borello*, the Wisconsin Court of Appeals has had the opportunity to apply the judicially created discovery rule[71] to a medical malpractice cause of action.[72] In *Kohnke v. St. Paul Fire & Marine Insurance Co.*,[73] the plaintiff was rendered sterile during a hydrocele sur-

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63. 130 Wis. 2d 397, 388 N.W.2d 140 (1986).

64. *Id.* Metal fume fever is caused by exposure to a significant amount of metal oxides and carbon monoxide, resulting in severe headaches and nausea. *Id.* at 402-03, 388 N.W.2d at 142.

65. *Borello*, 130 Wis. 2d at 400, 388 N.W.2d at 141.

66. *Id.* at 409, 388 N.W.2d at 145.

67. The *Borello* court did not consider the decision as an expansion of *Hansen*:

> It is apparent from the general tenor of *Hansen* that this court did not, by the language "claims shall accrue on the date the injury is discovered," mean the date on which manifestations of the injury shall first appear . . . . Hence, *Hansen* stands for the proposition that the cause of action does not accrue in a malpractice action until the *nature* of the injury was, or reasonably ought to have been, known to the claimant.

Id. at 408-09, 388 N.W.2d at 144-45 (emphasis in original).

68. *Id.* at 411, 388 N.W.2d at 146.

69. Section 102.12 of the Wisconsin Statutes provides that the statute of limitation does not commence until the employee "knew or ought to have known the nature of his or her disability *and* its relation to the employment." *Borello*, 130 Wis. 2d at 406, 388 N.W.2d at 143 (emphasis added).

70. *Borello*, 130 Wis. 2d at 403-04, 388 N.W.2d at 142-43.

71. The judicially created rule is the discovery rule denounced in *Hansen*, which is more broadly applied than 893.55.

72. *See* Kohnke v. St. Paul Fire & Marine Ins. Co., 140 Wis. 2d 80, 410 N.W.2d 585 (Ct. App. 1987).

73. *Id.*

gery shortly after his birth in 1961.[74] The former three-year limitations statute[75] was in effect at the time of the plaintiff's injury, yet the court held that the cause of action did not accrue until the claim was discovered in 1983.[76] In doing so, the court ruled Wisconsin Statute Section 893.55 unconstitutional as to these specific circumstances and applied the *Borello* discovery rule instead.[77]

It is not difficult to predict the conflicts and discrepancies that are apt to plague the courts in the very near future.[78] An analysis of the questions, arising out of *Hansen* and *Borello* in particular, will serve to promote awareness in an effort for legislative and judicial change in the application of the discovery rule in personal injury cases.

III. ANALYSIS

Most courts have abandoned the common law rule that the statutes of limitation commence at the time of the negligent act or omission[79] unless the accompanying injury results and is recognized simultaneously.[80] This rule is grounded upon statutory language and public policy. Since a cause of action accrues when there exists a claim capable of enforcement,[81] it only follows that both the act giving rise to the injury and the resultant injury itself must exist prior to the commencement of the statutes of limitation.[82] Although this rule is consistently applied among the courts today,[83] incon-

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74. *Id.* at 82, 410 N.W.2d at 586. "A segment of his epididymis, the structure wherein sperm is stored, was apparently accidentally removed during the operation. He first discovered his injury when, as a married man some twenty-two years later, he sought medical advice for a suspected fertility problem." *Id.* at 82-83, 410 N.W.2d at 586.

75. WIS. STAT. § 330.205 (1959).

76. *Kohnke*, 140 Wis. 2d at 86, 410 N.W.2d at 588.

77. The appeals court stated:

> Under this statute, because a medical malpractice action may never be commenced more than five years from the act or omission, Brian's claim would have been barred as of October 16, 1966. This is nearly fourteen years before the statute was adopted, and more than seventeen years before the injury was discovered. That result is unacceptable because it violates art. I, sec. 9, of the Wisconsin Constitution . . . .
>
> Our decision holds only that sec. 893.55 is void as applied to the peculiar facts of this case.

Id. at 88-89, 410 N.W.2d at 588.

78. *See infra* text accompanying notes 142-61.

79. *See* McGovern, *The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future*, 16 FORUM 416 (1981) (survey of statutes of limitation in various states).

80. *See* Birnbaum, *"First Breath's" Last Gasp: The Discovery Rule in Products Liability Cases*, 13 FORUM 279, 281 (1977-78).

81. *See supra* note 31.

82. Holifield v. Setco Indus., 42 Wis. 2d 750, 756, 168 N.W.2d 177, 180 (1969).

83. *See supra* note 31.

sistency plagues the courts when the issue concerns the definitions of "injury"[84] and "discovery."[85]

A. What Is An "Injury?"

The discovery rule provides that "a claim does not accrue until the injury is discovered or in the exercise of reasonable diligence should be discovered."[86] Until the injury occurs, there is no cause of action for damages.[87] Thus the question often arises, what is an injury?[88] In most tort cases this question causes no problem, but complications exist among the growing number of delayed injury cases.[89] Although different torts produce a variety of injuries and concerns, a single definition for "injury" would provide the courts with a definite standard which would ultimately produce the most equitable and uniform results.

1. Medical Malpractice: The "Foreign Object" Illustration

The clearest example of the problem in defining an "injury" is in conjunction with "foreign object" medical malpractice cases.[90] Some courts

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84. *See* Peterson v. Roloff, 57 Wis. 2d 1, 203 N.W.2d 699 (1973). *See also* McDaniel v. Johns-Manville Sales Corp., 542 F. Supp. 716 (N.D. Ill. 1982); Reimer v. Owens-Corning Fiberglass Corp., 576 F. Supp. 197 (E.D. Wis. 1983); Neubauer v. Owens-Corning Fiberglas Corp., 504 F. Supp. 1210 (E.D. Wis. 1981); Olsen v. Bell Tel. Laboratories, Inc., 388 Mass. 171, 445 N.E.2d 609 (1983); Myles v. Johns-Manville Sales Corp., 9 Ohio App. 3d 257, 459 N.E.2d 620 (1983); Borello v. U.S. Oil Co., 130 Wis. 2d 397, 388 N.W.2d 140 (1986); Hansen v. A.H. Robins Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

85. *See* Call v. Kezirian, 135 Cal. App. 3d 189, 185 Cal. Rptr. 103 (1982); Reis v. Cox, 104 Idaho 434, 660 P.2d 46 (1982); Wigginton v. Reichold Chems., Inc., 133 Ill. App. 2d 776, 274 N.E.2d 118 (1971); McCarroll v. Doctors Gen. Hosp., 664 P.2d 382 (Okla. 1983); *Borello*, 130 Wis. 2d 397, 388 N.W.2d 140; *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578; Rod v. Farrell, 96 Wis. 2d 349, 291 N.W.2d 568 (1980).

86. *Hansen*, 113 Wis. 2d at 556, 335 N.W.2d at 581.

87. Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp., 96 Wis. 2d 314, 324, 291 N.W.2d 825, 830 (1980) (quoting *Holifield*, 42 Wis. 2d at 756, 168 N.W.2d at 180).

88. *Peterson*, 57 Wis. 2d at 9, 203 N.W.2d at 703 (Hallows, C. J., dissenting). For cases that describe an injury, see *supra* note 84.

89. The reason for this difference is that in product liability cases, there are a number of possible time periods that one could consider an injury to have occurred:

> [W]hen the potential plaintiff first comes into contact with the chemical, drug, or pollutant which causes the harm . . . . [W]hen the first symptoms of the disease or injury manifest themselves . . . . [W]hen the potential plaintiff first discovered or reasonably should have discovered that the disease resulted from plaintiff's use of defendant's defective product.

Birnbaum, *supra* note 80, at 281.

90. *See* Layton v. Allen, 246 A.2d 794 (Del. 1968); Parker v. Vaughan, 124 Ga. App. 300, 183 S.E.2d 605 (1971); Billings v. Sisters of Mercy of Idaho, 86 Idaho 485, 389 P.2d 224 (1964); Flanagan v. Mount Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969); Foil v. Ballinger, 601 P.2d 144 (Utah 1979); *Peterson*, 57 Wis. 2d 1, 203 N.W.2d 699.

argue that: "an injury occurs when a foreign object is left in the body of a patient, even though neither the surgeon nor the patient knew of the forgotten foreign object and other than the presence of the foreign object . . . no disability, disease or pain resulted."[91]

This definition is clear on its face but fails to consider the grave consequences facing an individual who has no knowledge that the object exists in their body. Until that object causes some adverse affect, the injured party may be incapable of recognizing his injury.[92] As a result, the discovery rule was adopted and applied to medical malpractice cases.[93] Even though the statute fails to define an injury, the policy reasons which support the use of the discovery rule indicate that an injury does not occur until discovery is made.[94]

2. Products Liability: The Asbestos Illustration

In most products liability cases, damages are immediately apparent at the time of the injury, therefore, there is no problem discovering when an injury has occurred.[95] Problems arise when the use of a product is unaccompanied by a perceptible injury.[96] Two major scenarios have developed in this category: (1) when a single tort produces a latent injury which is discoverable at a later date[97] and (2) when a single or multiple tort produces a series of latent injuries.[98] This first situation is quite similar to the "foreign object" medical malpractice case and therefore it is unnecessary to comment on it.[99] It is the second situation that has caused the most concern in pinpointing a time of injury.

Asbestos cases, for example, often involve a number of injuries resulting from the same harmful exposure.[100] Two of the most common diseases as-

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91. *Peterson*, 57 Wis. 2d at 9, 203 N.W.2d at 703 (Hallows, C.J., dissenting).

92. *Id.* at 11-12, 203 N.W.2d at 704-05.

93. *See supra* text accompanying note 21.

94. *See* Ghiardi, *supra* note 1, at 577-79.

95. *Neubauer*, 504 F. Supp. at 1213. *See also Holifield*, 42 Wis. 2d 750, 168 N.W.2d 177.

96. *See generally For Want of a Nail*, *supra* note 45; Note, Wilson v. Johns-Manville Sales Corp. *and Statutes of Limitations in Latent Injury Litigation: An Equitable Expansion of the Discovery Rule*, 32 CATH. U.L. REV. 471 (1982-83) [hereinafter *Latent Injury Litigation*]; Birnbaum, *supra* note 80.

97. *See, e.g.*, Hansen v. A.H. Robins Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

98. *See, e.g.*, Neubauer v. Owens-Corning Fiberglas Corp., 504 F. Supp. 1210 (E.D. Wis. 1981).

99. *See supra* notes 90-94 and accompanying text.

100. "[A]sbestosis and mesothelioma are progressive diseases caused by prolonged exposure to asbestos dust. . . . There also appears to be no dispute that a tendency toward pneumonia, shortness of breath, wheezing, pleural calcification, and pulmonary disfunction may be symptomatic of asbestos-caused disease." *Neubauer*, 504 F. Supp. at 1212. *See also* Urie v. Thompson,

sociated with asbestos insulation are asbestosis[101] and mesothelioma.[102] The question ultimately becomes whether the injury occurs at the first symptoms of the first disease or upon the manifestation of the subsequent disease.[103] One court properly recognized that "[t]here is rarely a magic moment when one exposed to asbestos can be said to have contracted asbestosis; the exposure is more in the nature of a continuing tort."[104] Therefore, the injuries caused by asbestos are to be considered as one and the adverse affects test can be applied.

Asbestos litigation poses an additional problem regarding diagnosis. More often than not, the first symptoms accompanying an asbestos-related injury are chest pains and shortness of breath.[105] Furthermore, the first medically demonstrable sign is a cloudy spot on the lung.[106] All of these signs are synonymous with a number of cancer-related diseases, which ultimately turns our attention to the "cause" of the injury.[107]

The statutes of limitation should not commence until the injured party has reasonable belief of the cause of his injury.[108] As such, the plaintiff has a duty to monitor his disease and commence action as soon as it is reasonably possible. The injured party's method of contact with the asbestos material could also play a very significant role.[109] Some commentators insist

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337 U.S. 163 (1949) (silicosis); Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809 (2d Cir. 1960) (berylliosis); Velasquez v. Fibreboard Paper Prods. Corp., 97 Cal. App. 3d 881, 159 Cal. Rptr. 113 (1979) (asbestosis); Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 394 A.2d 299 (1978) (malignant mesothelioma).

101. "Asbestosis is a progressive, irreversible lung disease caused by the inhalation of asbestos fibers." *Latent Injury Litigation*, *supra* note 96, at 472 n.8 (citing STEDMAN'S MEDICAL DICTIONARY 128 (5th unabr. law. ed. (1972)).

102. "Mesothelioma is a cancer of the mesothelial cells which line the chest walls and surround the organs of the chest cavity. It is an extremely rare form of cancer, offers a poor prognosis for recovery, and is usually fatal." *Id.* at 472-73 n.9 (citing *Stedman's Medical Dictionary* 861 (5th unabr. law. ed. (1972)).

103. For example, asbestosis involves a three-stage process: the time of initial exposure, when harm is done but the disease is undetectable; the time of discovery, when x-rays could detect the disease; and the time of manifestation, when the victim would notice the effects of the disease. Comment, *Asbestosis: Who Will Pay the Plaintiff?*, 57 TUL. L. REV. 1491, 1509 (1983).

104. Karjala v. Johns-Manville Prods. Corp., 523 F.2d 155, 160 (8th Cir. 1975).

105. *See* ROBBINS, COTRAN & KUMAR, PATHOLOGIC BASIS OF DISEASE 761 (3d ed. 1984). *See also* Milwaukee J., Feb. 16, 1987, at D 1.

106. *See* Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1082-83 (5th Cir. 1973).

107. For example, DES, a drug taken by women to prevent miscarriages, has been linked to causing cancer in some of the female offspring of the mothers who used the drug. TRIS, a chemical used to make cloth flame retardant, has been banned by the Consumer Product Safety Commission because of its carcenogenic effect.

Birnbaum, *supra* note 80, at 285 n.26.

108. *Borello*, 130 Wis. 2d 397, 388 N.W.2d 140.

109. Virtually every urban dweller is exposed to small amounts of asbestos dust in the air because it is so widely used in innumerable products, e.g., sewage and water conduits,

that for years, insulators and pipe line employees have been aware of the dangerous effects of asbestos materials and, as a result, they should have a reasonable belief that their physical condition was caused from inhaling asbestos fibers as opposed to another environmental condition.[110] In contrast, a school teacher who is exposed to asbestos insulation in a more distant fashion might not be able to predict the cause of his plight.

Despite the additional individual analysis required for latent injury cases, the adverse affects test proves to be universally useful. The test requires affirmative duties on the part of the plaintiff in an attempt to restore the original purpose of the statutes of limitation.

B. What is "Discovery?"

Many jurisdictions, including Wisconsin, have defined the term "discovery" in various ways,[111] resulting in confusion in the application of the discovery rule.[112] Many cases define "discovery" as the discovery of injury,[113] while others include discovery of the cause of injury in their definition.[114] Nevertheless, the inconsistency of definitions within a single state produces substantially different outcomes for each party.[115]

1. Definitions of "Discovery"

One interpretation of the word "discovery" suggests that there is no reason to toll the statute if the plaintiff is aware that he has suffered some

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flooring and roofing products, insulation, brake linings, clutch casings, and coating compounds. Even water supplies and foods become contaminated by the airborne pollution. ROBBINS, COTRAN & KUMAR, PATHOLOGIC BASIS OF DISEASE 438 (3d ed. 1984).

110. If knowledge of the disease, the symptoms, and the causes are widespread among persons in the same or similar occupation as the plaintiff, then that plaintiff ought to recognize his condition and seek immediate medical assistance.

111. *See Myles*, 9 Ohio App. 3d 257, 459 N.E.2d 620 (discovery of injury by competent medical authority); *Borello*, 130 Wis. 2d 397, 388 N.W.2d 140 (discovery of injury and cause of injury); *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578 (discovery of injury).

112. *Compare Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578 *with Borello*, 130 Wis. 2d 397, 388 N.W.2d 140. Similarly, New Hampshire Supreme Court Justice Kenison stated:

> "One might read several discovery rule cases and conclude that the courts are applying two substantively distinct rules. In most cases the courts frame the rule in terms of the plaintiff's discovery of the causal relationship between his injury and the defendant's conduct. In some cases . . . a court will simply state that, under the discovery rule, a cause of action accrues when the plaintiff discovers or should have discovered his injury. Still other courts use both statements of the rule within the same case."

Borello, 130 Wis. 2d at 409-10, 388 N.W.2d at 145 (citing Raymond v. Eli Lilly & Co., 117 N.H. 164, 170-71, 371 A.2d 170, 174 (1977) (citation omitted)).

113. *See infra* notes 116-23 and accompanying text.

114. *See infra* notes 124-29 and accompanying text.

115. *See supra* note 111.

injury.[116] Thus, for example, when a person is injured while using a particular defective product or becomes ill after consuming a tainted beverage, the statute of limitation commences at the time of injury or illness and not upon the discovery of the product's defectiveness. The policy underlying this theory is that the injured party has a duty to proceed with due diligence in making his claim since the plaintiff became aware of his right to sue at the time of injury.[117] Most critics of this theory of subjective self-diagnosis are concerned with the diagnostic abilities of the average plaintiff in cases involving progressive and insidious diseases.[118]

The objective medical diagnosis theory is premised upon the belief that an injured party could not possibly be expected to make a self-diagnosis of a progressive disease.[119] In jurisdictions adhering to this interpretation of the term "discovery," the statutes of limitation begin to run at the time the plaintiff is informed of the injury by a physician.[120] At least one jurisdiction limits this approach in an effort to avoid tolling the statutes of limitation in cases where the injured party neglects to seek medical care.[121] The court, in *Johnson v. Koppers Co.*,[122] safeguarded the rule by stating that a cause of action accrues either upon the date that the injured person is informed by competent medical authority or upon the date on which the injured person should have become aware that he had been injured.[123]

Perhaps the most litigated interpretation of the discovery rule states that the statute does not commence until the injured party is aware of the injury and the cause of such injury.[124] Problems evolve in cases where the injury and the discovery of the causal relationship do not occur simultaneously.[125] Some courts justify this theory based on the nature of progressive and insid-

116. *See* Lofton v. General Motors Corp., 694 F.2d 514 (7th Cir. 1982) (applying Illinois law); Friends Univ. v. W.R. Grace & Co., 227 Kan. 559, 608 P.2d 936 (1980).

117. *See* Bates v. Little Co. of St. Mary Hosp., 108 Ill. App. 3d 137, 438 N.E.2d 1250 (1982).

118. Examples of progressive diseases are: asbestosis, mesothelioma, berylliosis, silicosis and pulmonary carcinoma.

119. *See* Bradt v. United States, 221 F.2d 325 (2d Cir. 1955); *Myles*, 9 Ohio App. 3d 257, 459 N.E.2d 620; *Borello*, 130 Wis. 2d 397, 388 N.W.2d 140.

120. Adherence to this interpretation becomes questionable in light of *Borello*, where three physicians supposedly misdiagnosed the plaintiff's condition. *Borello*, 130 Wis. 2d at 401, 388 N.W.2d at 141.

121. *See, e.g.*, Johnson v. Koppers Co., 524 F. Supp. 1182 (N.D. Ohio 1981); *Myles*, 9 Ohio App. 3d 257, 459 N.E.2d 620.

122. 524 F. Supp. 1182 (N.D. Ohio 1981).

123. *Id.*

124. *See* Fearson v. Johns-Manville Sales Corp., 525 F. Supp. 671 (D.D.C. 1981); Grabowski v. Turner & Newall, 516 F. Supp. 114 (E.D. Pa. 1980); Cathcart v. Keene Indus. Insulation, 324 Pa. Super. 123, 471 A.2d 493 (1984); *Borello*, 130 Wis. 2d 397, 388 N.W.2d 140.

125. *See supra* note 91.

ious disease, arguing that a standard discovery rule[126] often bars the injured party's claim shortly after the injury is discovered but before the party has any indication of the cause of injury.[127] There is little fear that these plaintiffs are "sleeping on their rights," merely because of the latent character of the harm suffered and the difficulties involved in identifying the cause of harm.

Some courts extend this theory even further by delaying the commencement of the statute until the plaintiff discovers the legally responsible party.[128] The rationale for this extension is that a defendant should not escape recourse for tortious conduct simply because the defendant's identity is difficult to discover.[129] This extension is capable of causing confusion, for it could conceivably be interpreted as requiring both knowledge of the responsible party and awareness of the existence of a legal cause of action. Nevertheless, this rule has not yet received general acceptance since most courts have disregarded the plaintiff's ignorance of the cause of his harm.[130]

2. Wisconsin's Present Definition of "Discovery"

The definition of discovery has been in dispute since the legislative enactment of the discovery rule.[131] However, the leading Wisconsin case[132] in the area of discovery failed to provide future parties with any determination as to "what" the plaintiff must discover to start the statutes of limitation running. The court in *Hansen v. A.H. Robins Co.*[133] simply stated that "a claim does not accrue until the injury is discovered or in the exercise of reasonable diligence should be discovered"[134] and that this rule was adopted "for all tort actions other than those already governed by a legislatively created discovery rule."[135] At first glance, one might conclude that the statute commences immediately upon discovery of the illness or injury.

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126. For the rule that defines "discovery" as discovery of injury, see *supra* note 116.

127. Cancer is the disease that best illustrates the need for developing this theory of discovery. *See supra* note 107 and accompanying text.

128. Louisville Trust Co. v. Johns-Manville Prods. Corp., 580 S.W.2d 497 (Ky. 1979). *See also* Nolan v. Johns-Manville Asbestos & Magnesia Materials Co., 74 Ill. App. 3d 778, 392 N.E.2d 1352 (1979).

129. *See* Reynolds, *Statute of Limitations Problems in Products Liability Cases Exercises in Privity, Symmetry, and Repose*, 38 OKLA. L. REV. 667, 673 (1985).

130. However, two jurisdictions do not toll the statute of limitations until the plaintiff discovers his legal cause of action. *See* Lopez v. Swyer, 62 N.J. 267, 300 A.2d 563 (1973); S.C. CODE ANN. § 15-3-535 (Law. Co-op. 1985 Supp.).

131. WIS. STAT. § 893.55 (1979-80).

132. *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

133. 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

134. *Id.* at 556, 335 N.W.2d at 581.

135. *Id.* at 560, 335 N.W.2d at 583.

A review of the facts in *Hansen*, however, casts doubt and confusion on the validity of this conclusion.

Hansen involved a woman who brought suit against A.H. Robins.[136] In 1974, the plaintiff had been fitted with a Dalkon Shield intrauterine device, known as an IUD.[137] Four years later the plaintiff became aware of various alarming symptoms and consulted a physician soon thereafter.[138] That physician concluded that her symptoms were probably not due to pelvic inflammatory disease (PID)[139] but rather resulted from gastroenteritis.[140] After subsequent examination by another physician, her condition was diagnosed as PID[141] and the statute began running. The facts in *Hansen* are significant when reviewing the court's decision. Since the plaintiff's discovery of her injury and the cause of her injury were simultaneous,[142] there was no need for the court to expand upon the definition of discovery to obtain a result in favor of the plaintiff.

The uncertainty surrounding the definition of "discovery" has continued. In a recent Wisconsin Supreme Court decision, *Borello v. U.S. Oil Co.*,[143] the plaintiff became ill immediately after the defendant installed a furnace in her home. Thereafter she subjectively concluded her symptoms were the result of the bad odor which was emitted from the furnace.[144] The plaintiff immediately sought medical assistance from various physicians who concluded that her illness "could not, with any degree of probability, be attributed to the furnace."[145] It was not until her examination by a fourth doctor that her original self-diagnosis was confirmed as "metal fume fever"[146] caused by the furnace.[147]

The *Borello* court interpreted *Hansen* in light of its facts and concluded that:

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136. *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578.

137. "An intrauterine device (IUD) is a contraceptive device which fits within the uterus. It is made of plastic or metal and has a tail string which extends through the cervical canal and into the vagina." *Id.* at 552 n.2, 335 N.W.2d at 579 n.2.

138. *Id.* at 552-53, 335 N.W.2d at 579.

139. "Pelvic inflammatory disease (PID) is caused by the presence of bacteria in the uterus." *Id.* at 552 n.3., 335 N.W.2d at 579 n.3.

140. Gastroenteritis is the inflamation of the stomach and intestine, usually due to an infection by virus or bacteria. BANTOM MEDICAL DICTIONARY 170 (1981).

141. *Hansen*, 113 Wis. 2d at 553, 335 N.W.2d at 579. PID is a pelvic inflammatory disease caused by bacteria in the uterus. *Id.* at 552 n.3, 335 N.W.2d at 579 n.3.

142. *Id.*

143. 130 Wis. 2d 397, 388 N.W.2d 140 (1986).

144. *Id.* at 400-01, 388 N.W.2d at 141.

145. *Id.* at 401, 388 N.W.2d at 141.

146. *See supra* note 64.

147. *Borello*, at 403-04, 388 N.W.2d at 142.

> Under the law enunciated by *Hansen*, most claims will accrue at the time of the negligent act or injury simply because, in the typical tort, all the elements of an enforceable claim are apparent at approximately that time — the negligent act, the injury, its nature, the cause of injury, and the identity of the defendant. "Discovery" in most cases is implicit in the circumstances immediately surrounding the original misconduct.[148]

As a result of this interpretation, the court had no trouble justifying the expansion of the definition of discovery to include a determination of "cause." In fact, the *Borello* court did not consider the decision as an expansion of *Hansen* in this respect; this interpretation was implied in *Hansen*.[149] If this natural transition exists between *Hansen* and *Borello*, it is interesting to review a recent federal district court case, decided shortly before *Borello*. The court in *Jaeger v. Raymark Industries, Inc.*[150] held that since the *Hansen* decision was clear on its face, there was no reason to extend the discovery rule to require discovery of the cause of injury.[151]

IV. Fear of Future Problems and Expansions

In the wake of *Hansen v. A.H. Robins Co.*[152] and *Borello v. U.S. Oil Co.*,[153] a number of questions remain, causing difficulties for individuals and corporations relying on the statutes of limitation. Although the statute has almost been expanded to its limit, due to the discovery rule, some crucial issues remain undecided.

Fortunately, the Wisconsin Court of Appeals has ruled in *Kempfer v. Evers*[154] that knowledge of the legal right to bring suit is not necessary to start statutes of limitation running. Clearly Wisconsin has refused to extend the discovery rule that far. However, both *Hansen* and *Borello* leave behind additional concerns regarding medical diagnosis and the completeness of claims. Both plaintiffs in *Hansen* and in *Borello* unfortunately fell victim to a number of physicians, who were unable to diagnose their injuries, prior to the determinative examinations by their respective doctors.[155] This repeated situation prompts one to inquire whether the area of medical competency will eventually find its way into the definition of discovery.

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148. *Id.* at 404-05 n.2, 388 N.W.2d at 143 n.2.
149. *Id.* at 409, 388 N.W.2d at 145.
150. 610 F. Supp. 784 (E.D. Wis. 1985).
151. *Id.* at 788.
152. 113 Wis. 2d 550, 335 N.W.2d 578 (1983).
153. 130 Wis. 2d 397, 388 N.W.2d 140 (1986).
154. 133 Wis. 2d 415, 395 N.W.2d 812 (Ct. App. 1986).
155. *See Borello*, 130 Wis. 2d 397, 388 N.W.2d 140; *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578.

Will a plaintiff be capable of tolling the statute before he has located a "sufficiently competent" physician, that is, one likely to testify in accordance with the plaintiff's original self-diagnosis? In effect, this is what happened with respect to each of the plaintiffs in *Hansen* and *Borello*.[156]

Similarly, one wonders just how definite or complete a claim must be to render it sufficient to toll the statute. The present interpretation of the discovery rule, as stated in *Borello*, suggests that the statute of limitation commences once the plaintiff discovers his injury and the cause of that injury.[157] An interesting situation exists when considering the cause element. To what degree of certainty must a cause of injury be decided? Consider this hypothetical: A woman subjectively believed her disease to be metal fume fever caused by her furnace, and this diagnosis was confirmed by one of the physicians she visited. However, another physician diagnosed her condition as asbestosis resulting from asbestos fibers in her insulation. Suppose this woman brought suit against the manufacturer of the furnace and the jury sided for the defendant. Could the plaintiff then initiate a negligence suit against the asbestos manufacturer based on the other physician's determination of cause? The elements of negligence: duty, breach, cause and harm,[158] are to be proven by the plaintiff, but it is the jury who ultimately decides whether the necessary causal connection exists.[159]

Finally, the present state of the statutes of limitation, specifically in latent disease claims, is in danger of losing its original purpose.[160] Since many of these diseases develop slowly and sometimes inconspicuously, many plaintiffs wait a number of years for the maturation of the disease in order to commence action.[161] Such a practice, however, eliminates the statutes of limitation defense.

V. NEED FOR RESPONSE

It is obvious from the influx in litigation over the statutes of limitation that some legislative or judicial response is necessary to preserve the effectiveness of the statutes. It is conceded that an increase in the number of

156. *Id.*

157. *Borello*, 130 Wis. 2d at 411, 388 N.W.2d at 146.

158. *See, e.g.*, Ollerman v. O'Rourke Co., 94 Wis. 2d 17, 288 N.W.2d 95 (1980).

159. Milwaukee & Suburban Transp. Corp. v. Royal Transit Co., 29 Wis. 2d 620, 130 N.W.2d 595 (1966).

160. *See* Reimer v. Owens-Corning Fiberglass Corp., 576 F. Supp. 197 (E.D. Wis. 1983). *See also* Comment, *supra* note 103; Birnbaum, *supra* note 80.

161. "In some cases, asbestosis may become manifest within 10 years of the date of initial exposure. In general, asbestos manifests itself between 10 and 25 years after initial exposure. Other asbestos-related diseases also have long latency periods." Comment, *supra* note 103, at 1491 n.2.

latent and insidious disease claims in the product liability field demanded a change in the application of the statutes.[162] Unfortunately, the Wisconsin Supreme Court, in an effort to compensate one plaintiff who suffered from such a disease, expanded the statute to reach all tort actions.[163] The breadth of such expansion was damaging to the effectiveness of the statutes of limitation; thus, an effort must be made, either legislatively or judicially, to restore meaning to the statute.

A. Legislative Change

The Wisconsin Supreme Court stated: "[s]uch arguments, pro and con, as to what limitations on bringing to court actions based on products liability and negligent manufacture will best serve the public interest are for the legislature, not the courts, to consider."[164] The legislature is by far the body most capable of making these determinations. It has greater resources and can establish committees to study these questions and weigh competing concerns. Yet the courts have failed to present any suggestions to the legislature even though it is in the best position to witness the effectiveness of laws.[165]

One of the more widely used methods of limiting the discovery rule involves the placement of an outer time limit on various tort claims rendering a hardship to defendants.[166] These "statutes of repose" generally commence at an earlier date than other statutes and end after a longer time period.[167] They represent a "return to the traditional form of time-bar statutes, even if they purport to mitigate the inequity of traditional statutes of limitations by extending the period during which a litigant may bring suit."[168] The constitutionality of statutes of repose have often been chal-

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162. *See supra* note 160.

163. Hansen v. A.H. Robins Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

164. Holifield v. Setco Indus., 42 Wis. 2d 750, 758, 168 N.W.2d 177, 181 (1969).

165. *See* Rod v. Farrell, 96 Wis. 2d 349, 291 N.W.2d 568 (1980); Peterson v. Roloff, 57 Wis. 2d 1, 203 N.W.2d 699 (1973); *Holifield*, 42 Wis. 2d 750, 168 N.W.2d 177; Reistad v. Manz, 11 Wis. 2d 155, 105 N.W.2d 324 (1960).

166. See Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627 (1985) for a discussion of the use of statutes of repose.

167. *See* W. PROSSER & W. KEETON, THE LAW OF TORTS § 30, at 168 (5th ed. 1984)

> General negligence statutes of limitations for personal injury range in duration from 1-6 years, typically 2, 3 or 4 years, depending on the state. *See, e.g.*, CCH Prod. Liab. Rep. 3420. Repose statutes typically range in length, for medical malpractice: 2-6 years; architect-contractor cases: 4-10 years; products liability: 6-12 years.

Id., § 30, at 168 n.31.

168. *Fairness and Constitutionality*, *supra* note 45, at 1683.

lenged,[169] resulting in the abolition of such statutes in several states [170] including Wisconsin.[171]

Since a reenactment of the statutes of repose is unlikely, alternative solutions must be found. One such alternative is reformation of the statutes of limitation by including separate statutes for different torts. This would alleviate the present problem of the progressive expansion of one statute to meet the needs of each type of tort.[172] Under this approach the legislature would adopt a longer period in which a plaintiff, who suffered from the effects of a latent or insidious disease due to a defective product, could bring a product action. Conversely, a shorter period would suffice for tort claims in which the plaintiff suffered immediate noticeable harm. Although this approach may be the most effective way to treat tort claims, such major legislative reform would be slow to develop.

Perhaps the easiest legislative change would be to revise Wisconsin Statute Section 893.54 to include the discovery rule, in effect codifying the decision of *Hansen v. A.H. Robins Co.*.[173] Additionally, sections 893.54 and 938.55 could be reworded to define "discovery" as the point in time when the injured party subjectively discovers the injury or in the exercise of reasonable diligence, should have discovered the injury. This legislative definition would eliminate the confusion caused by the many different judicially developed definitions[174] and emphasize the importance of the injured party's obligation of due diligence in pursuing his claim.[175] In all fairness, if a manufacturer is responsible for taking all necessary precautions to insure that a product is safe, then a party plaintiff should also pursue a potential claim with the same diligence. This is not to say that an average citizen should be capable of making the complex diagnosis involved with many product cases. On the contrary, this statute of limitation would commence upon the initial discovery of an injury in an effort to provoke the injured

169. *See* Barwick v. Celatex Corp., 736 F.2d 946 (4th Cir. 1984); Wayne v. Tennessee Valley Auth., 730 F.2d 392 (5th Cir. 1984); Van Den Hul v. Baltic Farmers Elevator Co., 716 F.2d 504 (8th Cir. 1983); Clark v. Singer, 250 Ga. 470, 298 S.E.2d 484 (1983); Davis v. Whiting Corp., 66 Or. App. 541, 674 P.2d 1194 (1984).

170. *See* Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979); Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548 (Minn. 1977); Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); Phillips v. ABC Builders, Inc., 611 P.2d 821 (Wyo. 1980).

171. W. PROSSER & W. KEETON, THE LAW OF TORTS § 30, at 168 n.34 (5th ed. 1984).

172. *See, e.g., Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578.

173. 113 Wis. 2d 550, 335 N.W.2d 578 (1983).

174. *See* Jaeger v. Raymark Indus., 610 F. Supp. 784 (E.D. Wis. 1985); Reimer v. Owens-Corning Fiberglass Corp., 576 F. Supp. 197 (E.D. Wis. 1983); Borello v. U.S. Oil Co., 130 Wis. 2d 397, 388 N.W.2d 140 (1986); *Hansen*, 113 Wis. 2d 550, 335 N.W.2d 578.

175. Keep in mind that the discovery rule does include the language "in the exercise of reasonable diligence." WIS. STAT. § 893.55(1)(b) (1979-80).

party to seek medical assistance at the earliest time possible. Punishing those individuals who "sit on their rights" would restore the original purpose of the statutes of limitation, a purpose that was virtually destroyed in *Borello v. U.S. Oil Co.*[176]

The proposed reform would not jeopardize the claim for those individuals who suffer from a progressive type disease or injury. The Wisconsin Supreme Court has held that fear of future adverse medical consequences is a compensable injury.[177] Furthermore, even the fact that a physician is unable to state to a reasonable degree of medical certainty that the feared consequence will occur is of no significance at all.[178]

Prompt litigation means prompt notice to the negligent defendant, which could have a major impact on the treatment of the injury and on the number of future claims. Plaintiffs would be forced to seek medical assistance at an early time, thus increasing their chances for effective treatment of present injuries and the alleviation of possible future effects. Additionally, once a defendant is aware of a pending lawsuit, that party has the opportunity to take immediate action to investigate the allegations and take action to reduce the possibility of future claims. To hold that the statute does not begin to run until diagnosis is made, which could conceivably be twenty-five to forty years in the future,[179] would discourage prompt investigation and litigation, thus thwarting the purpose for modern day discovery.

B. Judicial Support

It would be unrealistic to believe that legislative change would be immediate. Therefore, judicial support is needed in the interim to enhance the effectiveness of the proposed reform. A test focusing on the plaintiff's duty to use reasonable diligence would be in line with statutory change.

Under a due diligence test, the plaintiff would be required to use reasonable diligence to adequately inform himself of the facts and circumstances upon which the claim is based.[180] Mistake and ignorance would play no part in this test. Once the plaintiff became aware of facts that would put him on notice of a possible claim, the statute would begin to run. The requisite notice would be "notice sufficient to excite attention and put a potential plaintiff on his guard and call for further inquiry."[181] A careful and diligent

176. 130 Wis. 2d 397, 388 N.W.2d 140 (1986).
177. Branter v. Jenson, 121 Wis. 2d 658, 360 N.W.2d 529 (1985).
178. *Id.*
179. ROBBINS, COTRAN & KUMAR, PATHOLOGIC BASIS OF DISEASE 760 (3d ed. 1984).
180. *See, e.g.*, Anthony v. Koppers Co., 496 Pa. 119, 436 A.2d 181 (1981).
181. Simpson v. Department of Health & Human Resources, 423 So.2d 71 (La. Ct. App. 1982).

application of this test, by the courts, would manifest just and consistent results until legislative reform could occur.

VI. CONCLUSION

Statutes of limitation reflect the policy of protecting defendants from stale and fraudulent claims. The application of the statutes does not depend upon the existence of a stale or fraudulent claim, but rather upon the number of years specified in the applicable statute.[182]

Recent Wisconsin case law has expanded the discovery rule, taking it outside of its statutory boundaries. This expansion has prompted the need for new legislation and judicial restraint in an attempt to restore consistency to Wisconsin case law. The proposed change is not intended to eliminate the policy of allowing meritorious claimants an opportunity to recover for their injuries. Rather, a greater emphasis will be placed on the plaintiff to exemplify due diligence in seeking his claim.

Statutes of limitation weigh *conflicting* public policies. As a result, some plaintiffs will be denied recovery regardless of the severity of their injury.

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182. *See* Borello v. U.S. Oil Co., 130 Wis. 2d 397, 388 N.W.2d 140 (1986); Hansen v. A.H. Robins Co., 113 Wis. 2d 550, 335 N.W.2d 578 (1983).